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9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

11 ISMAEL JIMENEZ, YOLANDA JIMENEZ,  
12 ANGELES JIMENEZ, ANTONIO JIMENEZ,  
13 CARMENTINA HERRERA, LUIS ALVAREZ,  
14 EBARISTO ALAVEZ, JOSEFA JIMENEZ,  
15 JESUCITA ORTIZ, RODOLFO ROBLES, and  
16 PROJECT SENTINEL, a California non-profit  
17 corporation, on behalf of itself and the general  
18 public,

15 Plaintiffs,

16 vs.

17 DAVID TSAI, UNDINE TSAI, and SHANG  
18 SHEN,

19 Defendants.

CASE NO. 5:16-cv-04434-EJD

**DEFENDANTS DAVID TSAI, UNDINE TSAI  
AND SHANG SHEN'S REPLY TO NATIONAL  
FAIR HOUSING ALLIANCE'S OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS**

**Date: November 2, 2017**

**Time: 9:00 a.m.**

**Crtrm: 4, 5th Floor**

**Judge: Honorable Edward J. Davila**

21 Defendants DAVID TSAI, UNDINE TSAI and SHANG SHEN ("Defendants") hereby submit  
22 their Reply Brief in response to the Amici Curiae Opposition to Defendants' Motion to Dismiss  
23 Plaintiffs' Second Amended Complaint, filed by National Fair Housing Alliance ("NFHA"); Housing  
24 Rights Center; Eden Council for Hope and Opportunity; Fair Housing Advocates of Northern  
25 California; Fair Housing Council of Orange County; Fair Housing Council of Riverside, Inc.; Fair  
26 Housing Council of the San Fernando Valley; Fair Housing Foundation; Fair Housing Napa Valley;  
27 and Inland Fair Housing & Mediation Board, (hereinafter collectively "Amici") on behalf of Plaintiffs.

28 Defendants incorporate by reference herein all arguments raised within Defendants' Reply to

1 Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, and all  
2 arguments raised within Defendants' Opposition to Amici's Motion for Leave to File an Amici Brief  
3 in Opposition to Defendants' Motion to Dismiss.

4 **I. INTRODUCTION**

5 Defendants have now had to file four (4) separate sets of briefs challenging the standing of  
6 Project Sentinel, including responding to the latest attempt by amici curiae, which was filed after  
7 Defendants' reply brief to Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second  
8 Amended Complaint. (Motion to Dismiss in response to original complaint, [Dkt. No. 26]; Motion to  
9 Dismiss and Reply in response to filing of first amended complaint, [Dkt. Nos. 40, 54]; Motion to  
10 Dismiss and Reply in response to filing of second amended complaint, [Dkt. Nos. 67, 84]; Reply in  
11 response to late filed amici opposition). Despite submitting a lengthy amici brief, Amici have merely  
12 restated the vast majority of the arguments raised by Plaintiffs, and have relied almost exclusively on  
13 the case law previously cited by Plaintiffs' counsel. Defendants believe that the amici brief is not  
14 timely, as it was filed thirteen (13) days after it was due, and after Defendants had filed their reply.  
15 (As extensively argued by Defendants in Defendants' Opposition to Amici's Motion for Leave to File  
16 an Amici Brief in Opposition to Defendants' Motion to Dismiss. [Dkt. No. 89]) Nor is it helpful, as it  
17 merely reiterates the same arguments previously raised by Plaintiffs in their opposition, and as such  
18 should be disregarded by the Court.

19 The only relevant additional authority cited by Amici is a new district court decision, *National*  
20 *Fair Housing Alliance v. Travelers Indemnity Company*, 2017 U.S. Dist. LEXIS 132899, which cites  
21 many of the same cases relied upon by Project Sentinel in its opposition, including the primary cases  
22 which have already been the focus of briefing in this matter (*Havens*, *Fair Housing of Marin*,  
23 *Smith/Pacific Properties*). That new decision brings no new law or argument into play, and amici  
24 have misstated a key passage in analyzing that decision in an effort to undermine this Court's prior  
25 decisions in this litigation, as well as other matters involving Project Sentinel.

26 **II. NATIONAL FAIR HOUSING ALLIANCE v. TRAVELERS**

27 In *National Fair Housing Alliance* ("NFHA") v. *Travelers Indemnity Company*, the Court  
28 noted that Travelers raised several arguments when contesting NFHA's standing. 2017 U.S. Dist.

1 LEXIS 132899 (D.D.C. August 21, 2017) Travelers first argued that NFHA's expenditures were  
2 voluntary and self-inflicted, an argument which was rejected by the D.C. District Court. *Id.* at \*15.  
3 Travelers next argued that NHFA had attempted to manufacture standing by diverting its resources  
4 "predicated on the conclusion that Travelers' conduct violated the fair housing laws." This argument  
5 was similarly rejected by the Court, which rightfully concluded that at the pleading stage, whether or  
6 not Travelers had actually violated the fair housing laws was irrelevant. *Id.* at \*15-16. Neither of  
7 these arguments, which were rejected by the Washington D.C. District Court, has been raised by  
8 defendants in the present matter.

9 The one argument Travelers made, which defendants in the present matter have also raised,  
10 revolves around the position that the activities taken by the NHFA to counteract any allegedly  
11 discriminatory practices are "wholly consistent with the very type of education and outreach efforts  
12 that are part of NHFA's stated mission," and thus cannot suffice for injury in fact. *Id.* at \*16. (For  
13 ease of reference, defendants will refer to this argument as the "Stated Mission" argument.)

14 With regard to this argument, the Travelers' court asserted that the Stated Mission argument  
15 was similar to an argument from another purportedly similar case that found the argument "borders  
16 both on the offensive and the absurd." *Id.* at \*17. (Quoting *National Fair Housing Alliance, Inc. v.*  
17 *Prudential Ins. Co. of Am.*, 208 F. Supp 2d 46, 53-54 (D.D.C. 2002))

18 However, the argument raised in the Prudential case was **vastly different** than the Stated  
19 Mission argument raised by Travelers, and more importantly, by Defendants in the present matter.  
20 The comment by the Court in the Prudential matter actually reads as follows: "The Court need not  
21 address defendants' theory that plaintiffs cannot be injured by the need to counteract discrimination  
22 because they have recovered funds to fight other sources of discrimination, an argument that borders  
23 both on the offensive and absurd." *Id.* at 54. (For ease of reference, we will refer to this argument as  
24 the "Recovered Funds" argument.)

25 Travelers didn't make the Recovered Funds argument, and the Defendants in the present  
26 matter similarly make no such argument. The Travelers court provided no analysis of its comparison  
27 of the Stated Mission argument and the Recovered Funds arguments, and it issued a conclusory  
28 statement with no support, which amici now seek to impose on this case. It is entirely unclear why the

1 Washington D.C. District Court chose to liken the Stated Purpose argument and the Recovered Funds  
2 argument, but it is clear that these disparate arguments are not similar, and should not be treated as  
3 such.

4 The Defendants in the present matter have not made the argument which the Washington D.C.  
5 District Court found so repugnant, and which the same District Court improperly relied upon in its  
6 Travelers decision. The conclusions reached by the Travelers decision as to the Stated Purpose  
7 argument are merely that: conclusions with no analysis. Accordingly, that Court's erroneous  
8 conclusion is not binding on this Court.

9 **III. AMICI'S OTHER ARGUMENTS ARE REPETITIVE OF PLAINTIFFS' ARGUMENTS**

10 Amici argues that "under *Havens* and *Fair Housing of Marin*, standing is established by  
11 frustration of an organization's mission and the diversion of its scarce resources." (Amici brief; 6:2-4)  
12 Amici also asserts that "under *Pacific Properties*, an organization establishes standing at the motion to  
13 dismiss stage by pleading frustration of its mission and a diversion of its resources to combat the  
14 discrimination at issue." (Amici brief; 8:14-16)

15 These same arguments and cases were included within Plaintiffs' opposition, and addressed by  
16 Defendants' in the reply to that opposition. "To constitute an injury under this theory, a defendant's  
17 conduct must do more than offend the priorities and principles of the organization; it must result in an  
18 actual impediment to the organization's real-world efforts on behalf of such principles. See *Havens*  
19 *Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982)." (Defendants' Reply to Plaintiffs'  
20 Opposition; 2:15-18)

21 "Diversion of resources" damages are cognizable where an organization is forced to divert  
22 time and resource away from its regular – or "core" – programs in order to undertake the particular  
23 case. See *Fair Housing of Marin v. Combs*, 2000 WL 365029, at \*3 (N.D. Cal. Mar. 29, 2000), aff'd,  
24 285 F. 3d 899 (9th Cir. 2002)." (Defendants' Reply to Plaintiffs' Opposition; 7:1-5)

25 Amici next argues that "Project Sentinel pled facts establishing that it has organizational  
26 standing at the motion to dismiss stage. (Amici brief; 10:8-9)

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1 This argument includes components of *Pacific Properties* and *Fair Housing of Marin*, and this  
2 argument was also addressed by Defendants' in its reply brief to Plaintiffs' opposition to the motion to  
3 dismiss.

4 Amici argues that "activities undertaken to counteract discrimination need not be outside the  
5 organizational mission to properly allege frustration of mission." (Amici brief; 12:3-4)

6 This argument was made by Plaintiffs' in their brief, which relied on the same cases cited  
7 throughout the Amici brief, including *Pacific Properties*, *Fair Housing of Marin*, and *Havens*.  
8 (Plaintiffs' brief; 11:1-13:22) The only new case referenced within Amici's argument is the Travelers  
9 matter, and as discussed above, Plaintiffs' reliance on that case appears misplaced based on the  
10 Travelers court improperly comparing a Stated Mission argument with a completely unrelated  
11 Recovered Funds argument.

12 Without rehashing all of the arguments raised within the reply to Plaintiffs' opposition,  
13 Defendants remind the Court that this district issued a ruling against Project Sentinel in a similar case,  
14 and that Court was quick to point out that standing is not something that should be manufactured.  
15 "Plaintiffs cannot manufacture standing by first claiming a general interest in lawful conduct and then  
16 alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitutes  
17 injury in fact." *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D.  
18 Cal. 1999).

#### 19 **IV. CONCLUSION**

20 The Amici brief provides no new argument, and the one new case focused on therein is not  
21 applicable to the facts of this matter, as the argument rejected by the Court in that case is not the  
22 argument raised by Defendants in the present matter. Defendants have been prejudiced in having to  
23 respond to the extremely late amici brief, however even if the Court were to consider the arguments  
24 contained therein, they are the same as raised by Plaintiffs' in both their Opposition To The Motion  
25 To Dismiss The First Amended Complaint, and The Opposition To The Motion To Dismiss The  
26 Second Amended Complaint. For all of these reasons, and based on the substantive argument  
27 contained within Defendants' Reply to Plaintiffs' Opposition To The Motion To Dismiss The Second  
28 Amended Complaint, Defendants respectfully submit that the motion to dismiss should be granted.

1 DATED: October 11, 2017

LEWIS BRISBOIS BISGAARD & SMITH LLP

2 By: /s/ James L. Shea

3 JAMES L. SHEA

4 Attorneys for Defendants

5 DAVID TSAI, UNDINE TSAI and SHANG SHEN

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